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No. 90-630

In The

Supreme Court of the United States

October Term, 1990

WILBUR K. KEATING, Executive Officer of the Public Employees' Retirement System, et al.,

Petitioners,

vs.

STATE OF NEVADA EMPLOYEES ASSOC., INC., (SNEA), a Nevada corporation, as representative of its members; ELLEN STEINER, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Can a state strip all its employees of the statutorily guaranteed right to a refund of retirement contributions by transferring the employees' contributions to an account declared unreachable?

II. Doesn't an unrepealed, 40 year-old statutory guarantee of a return of retirement contributions constitute a contract between a state retirement system and its members?

III. Is a state retirement system obligated to deal fairly and equitably with all of its members, who are required to participate in the system?

LIST OF PARTIES

Respondents refer to petitioners' list of parties with the added notation that the State of Nevada Employees Association, Inc., is a non-stock, non-profit corporation with no parent companies or subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the petition for writ of certiorari as follows.

STATEMENT OF THE CASE

All full-time state employees – about 10,000 in number – are required to participate in Nevada's Public Employees' Retirement System (PERS). They are not covered by federal Social Security.

Until 1985, state employees were under the joint contribution plan, whereby the employee's share was deducted from his gross pay and matched by his state employer. At all times Nevada law guaranteed each such employee the return of at least the total employee contributions made and credited to his individual account. Nev. Rev. Stat. 286.410, Appendix App. 1. Thus, if an employee left state service, he could obtain a refund of his contributions. With 10 years required to vest a retirement benefit, a contribution refund was the only money 93% of state employees ever received from the retirement system.

Beginning in 1985, state employees were legislatively required to participate in the "employer-paid" contribution plan. The employees had to take a pay cut equal to their share of the contribution; then the employer "paid" the entire contribution. While Nev. Rev. Stat. 286.410 guaranteeing the return of at least the employee contributions was not amended or repealed, it was circumvented by a provision in the employer-paid law prohibiting deposit of these funds in the employee's individual account and declaring them unavailable for refund. Nev. Rev. Stat. 286.421(4), reprinted in full in the petition. Worse yet, the employee's lost pay within the first 10 years of employment – typically over $20,000 – was used by the retirement system to help pay for post-retirement benefit increases for retirees.

On appeal, the United States Court of Appeals for the Ninth Circuit determined that the employees have contractual rights in their pension plan, that the modification complained of constituted a contractual impairment, and that the impairment was neither reasonable nor necessary. In doing so, the court applied settled legal principles to all the facts of record, and the result was both sensible and fair.

REASONS FOR DENYING THE WRIT

1. The issues in this case are not sufficiently important to warrant this Court's attention.

This dispute involves the 10,000 or so state employee members of Nevada's Public Employees' Retirement System. Even though the remaining 35,000 public employee members of PERS are also covered by "employer-paid," virtually all of those employees voluntarily went under the system through their collective bargaining process, receiving unknown concessions or other benefits in return.

State employees, who do not have collective bargaining, were mandated into the plan and received no advantage comparable to the disadvantage of the loss of a refund right.

Furthermore, not even any other state has the same plan. The employees' actuarial expert testified at trial:

> MS. MCCOY: Tell us, if you can, Mr. Hendrickson, how common is a non-refundability feature in a public retirement system? In other words, is it usual or unusual for an

employee to be able to withdraw his contributions or not to be able to withdraw his contributions when he leaves the system?

A. It is very rare that any public system would provide that if an employee contributed to it that that employee would not recover his or her contributions upon termination of employment if the employee chose to recover.

Q. On what do you base that conclusion?

A. Several points. I think the most relevant is the study conducted by the American Association of Retired Persons, AARP. * * * Their conclusions in the report were that of the 50 states 48 states refunded employer contributions, in fact, 41 refunded both the contributions and the interest. Only seven didn't refund the interest. So, 48 refunded.

The 49th state is Florida, and Florida has a pure employer-pay plan. The employees do not get any reduction [in] benefits, never have. The employer does in fact pay all the costs of the system; so, there are no employee contributions to be refunded.

The only one out of the 50 studied that does not refund employee contributions is the State of Nevada according to that study. That supports my personal experience. I am not aware of any public system except Nevada that doesn't refund it.

Trial Transcript, pp. 272-73.

This testimony was corroborated by the testimony of the PERS actuary:

MS. MCCOY: And how many other systems are you familiar with that have the same type of provision that an employee takes a cut in pay to

> go under an employer-paid plan, the money is not put in his individual retirement account and it is not refundable to the employee? How many other systems are you familiar with that have the same provision?
>
> MR. MACKIN: The Nevada system has provisions that are unique to Nevada. I do not know of any system that has precisely the same provisions.

Trial Transcript, p. 427.

This Court has long considered it important to be " . . . consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), cited, *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

2. The Court of Appeals reached a fair and correct result.

Petitioners argue that the Ninth Circuit Court of Appeals should not have applied the Contract Clause of the U.S. Constitution to protect employees hired after the effective date of the retirement modification because those employees have no contract with the state. Their argument fails for two reasons.

First, in their petition for rehearing, petitioners had ample opportunity to ask the Court of Appeals to define or otherwise describe what, if any, contract with these employees the legislation impaired. This they did not do. Where issues are neither raised before nor considered by

the Court of Appeals, this Court will ordinarily not consider them. *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

Second, if petitioners had sought a clarification of this issue, Judge Beezer might well have advised that: 1) All full-time state employees – past, present and future – are required to be members of PERS; 2) Nev. Rev. Stat. 286.410 has and continues to guarantee to all employee members of PERS the return of their contributions; 3) Legislatively transferring the employees' contributions to an account declared non-refundable is an impairment of the state's obligation under the contract created by Nev. Rev. Stat. 286.410; and 4) Being unreasonable and unnecessary, the impairment is unconstitutional.

The Court of Appeals' result was not only correct, it was fair. The state's mandatory employer-paid scheme creates an obvious inequity for 93% of state employees. They are required to belong to PERS; they typically do not vest a retirement benefit; yet tens of thousands of dollars of their earned pay is exacted and kept by PERS to pay for benefits accrued to former employees.

CONCLUSION

The outcome of this case is important only to the parties. The result below was correct and fair. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

286.410 Amount of contribution by member of system; deduction from payroll; return of contributions; disabled members.

1. The employee contribution rate is 9 percent of compensation for police officers and firemen and 8 percent of compensation for all other members, plus in each case one-half of any increase required by NRS 286.465.

2. From each payroll during the period of his membership, the employer shall deduct the amount of the member's contributions and transmit the deduction to the board at intervals designated and upon forms prescribed by the board. The contributions must be paid on compensation earned by a member from his first day of service.

3. Any employee whose position is determined after July 1, 1971, to be eligible under the early retirement provisions for police officers and firemen shall contribute the additional contributions required of police officers and firemen from July 1, 1971, to the date of his enrollment under the police and firemen's retirement fund, if employment in this position occurred before July 1, 1971, or from date of employment in this position to the date of his enrollment under the police and firemen's retirement fund, if employment occurs later.

4. Except as provided in NRS 286.430, the system shall guarantee to each member the return of at least the total employee contributions which the member has made and which were credited to his individual account. These contributions may be returned to the member, his

estate or beneficiary or a combination thereof in monthly benefits, a lump sum refund or both.

5. Disabled members who are injured on the job and receive industrial insurance benefits for temporary total disability remain contributing members of the system for the duration of the benefits if and while the public employer continues to pay the difference between these benefits and his regular compensation. The public employer shall pay the employer contributions on these benefits.

286.430 Withdrawal of contributions.

1. Except as otherwise provided in subsection 8, a member may withdraw the employee contributions credited to his individual account if:

(a) He has terminated service for which contribution is required; or

(b) He is employed in a position for which contribution is prohibited.

2. The system shall not refund these contributions until it has received:

(a) A properly completed application for refund;

(b) A notice of termination from the member's public employer or a certification by the public employer that the member is employed in a position for which contribution is prohibited; and

(c) Except as otherwise provided in subsection 3, all contributions withheld from such member's compensation.

3. If a member submits an application for a refund of his contributions before all of his contributions which were withheld have been remitted, the system may refund the portion of his contributions which it has received.

4. If it is determined, after the system has refunded the contributions of a member, that an additional amount of less than $10 is due to him, a refund of that amount need not be paid.

5. Refunds, pursuant to this section, must be made by check mailed to the address specified by a member in his application for refund.

6. The system shall transfer all money retained pursuant to subsection 4 and the amount of any unclaimed refund checks to the public employees' retirement fund or the police and firemen's retirement fund.

7. All membership rights and active service credit in the system, including service for which the public employer paid the employee contributions, are canceled upon the withdrawal of contributions from a member's account.

8. A member who transfers to a position for which contribution is prohibited must remain in that position for at least 90 days before he is eligible to receive a refund pursuant to this section.